

DOING THINGS WITH THE PAST: A CRITIQUE OF THE USE OF HISTORY BY HONG KONG'S COURT OF FIRST INSTANCE IN *W v REGISTRAR OF MARRIAGES*

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The Court of First Instance's decision to deny W, a male-to-female transsexual, the right to marry is premised on the understanding that marriage has been a largely stable and monolithic institution until recently. This article challenges the court's narrative of marriage history. It reconsiders the judicial historiography on which the decision is based, and by placing the W case in the context of the development of marriage argues that W should be allowed to marry at the present time.

In *W v Registrar of Marriages*, the Court of First Instance in Hong Kong denied a male-to-female transsexual the right to marry.¹ Justice Andrew Cheung's judgment is based on two lines of reasoning: first, that as a matter of statutory interpretation a male-to-female transsexual cannot be defined as a "woman" or as "female" under the legislation governing marriage in Hong Kong; and second, that the constitutional right to marry as defined by the Basic Law and the Bill of Rights does not cover transsexual marriage.

Justice Cheung's opinion on the two issues above – statutory interpretation and constitutionality – is premised on a discussion of the history of marriage, both in Hong Kong and in England. By examining the colonial origins of Hong Kong's Marriage Ordinance and the changes occasioned by the local reforms of 1970–71, he opines that allowing transsexuals to marry at the present juncture would represent an unprecedented and unjustifiable challenge to the institution of marriage which, in his view, has been remarkably stable over the years, despite various vicissitudes which are regarded as largely irrelevant. In other words, the court's

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¹ [2010] 6 HKC 359. In the following discussion I use the term "transsexual" people to mean post-operative transsexuals to stay within the factual framework of the case itself.

understanding of history underpins its conclusion that transsexuals do not have the right to marry in Hong Kong at the present time.

This article argues that the court's understanding of the history of marriage is fundamentally flawed. It draws on the work of historians of marriage to show that, far from being a stable and monolithic institution, marriage has been consistently modifying and updating itself, especially since the nineteenth century.² By critiquing the court's use of history both in its discussion of statutory interpretation and in its analysis of the applicant's constitutional right to marry, it further demonstrates that setting the "W" case in the context of the history of marriage would in fact lead to the opposite conclusion: giving transsexuals the right to marry in Hong Kong at the present time represents a logical development in this history.³

The History of Marriage and Statutory Interpretation

The first issue which the court discussed was whether a male-to-female transsexual would fall within the scope of the word "woman" in s40(2) of the Marriage Ordinance, and also within the scope of the word "female" in s21 of the same ordinance and s20(1)(d) of the Matrimonial Causes Ordinance. The court reiterated that it would adopt a purposive approach to interpretation, without distorting the plain meaning of the statute.⁴

The history of marriage is relevant to the issue of statutory interpretation because the court deemed it necessary to return to the origins and developments of marriage laws in Hong Kong in order to ascertain the purpose of the ordinance. Justice Cheung opines that it is "correct" to view the Marriage Ordinance as "a piece of legislation to recognize, regulate and restrict marriages in our society."⁵ He then elaborates upon this triple function of recognition, regulation, and restriction. The idea that the ordinance recognizes marriage is uncontroversial, for its primary

² See, for instance, Nancy Cott, *Public Vows: A History of Marriage and the Nation* (Cambridge: Harvard University Press, 2000); Leonore Davidoff, Megan Doolittle, Janet Fink and Katherine Holden, *The Family Story: Blood, Contract and Intimacy 1830–1960* (London and New York: Longman, 1999); Marilyn Yalom, *A History of the Wife* (New York: HarperCollins, 2001); Martha Vicinus (ed), *A Widening Sphere: Changing Roles of Victorian Women* (London: Methuen & Co., 1980); Edward Westermarck, *History of Human Marriage* (3 vols) (London: Macmillan, 1925).

³ For useful discussions of transgender jurisprudence and culture more generally, see Andrew Sharpe, *Transgender Jurisprudence* (London: Cavendish 2002); Paisley Currah, Richard M. Juang, Shannon Price Minter (ed) *Transgender Rights* (Minneapolis: University of Minneapolis Press 2006); and Stephen Whittle, *Respect and Equality* (London: Cavendish 2002).

⁴ Paras 106–107.

⁵ Para 111.

function is, after all, to give legal recognition to properly conducted marriages. The use of the word “regulate”, however, deserves scrutiny, for it is here that the court first engages with the history of marriage. In elaborating upon the way in which the legislation regulates marriage, Justice Cheung returns to a specific moment in the history of marriage in Hong Kong, that of the reforms of 1970 to 1971.

Prior to the enactment of the reforms, there existed three different types of marriage in the territory: Chinese customary marriage, which allowed men to take concubines; Chinese modern marriage, as outlined in the Chinese Civil Code; and marriage contracted under the Marriage Ordinance, known as registry marriage. The reforms of 1970–71 consolidated marriages in Hong Kong so that from that point on, the only legally recognized form of marriage was registry marriage. Registry marriage is now defined in s40(1) of the Marriage Ordinance, which states that every marriage under the ordinance is to be a Christian marriage or the civil equivalent of a Christian marriage.⁶ Justice Cheung notes: “after the great reforms of 1970/1971, registry marriage in accordance with the Ordinance is now the *only* way to contract a legal marriage in Hong Kong. The Ordinance regulates how a marriage is to be celebrated”.⁷

It is important to ponder over the court’s use of history here. The primary aim of the 1970/1971 reforms was to streamline a messy system of marriage, and in particular to abolish the system of concubinage. A question arises: what relevance do these reforms have to do with the question at hand? In what ways is the history of how customary marriage was abolished in Hong Kong similar to the issue of whether transsexuals can get married? The answer, of course, is that there is no relevance: concubines and male-to-female transsexual wives are entirely different creatures. In this light, the court’s use of this particular episode in history is highly suspect. Given the complete lack of relevance, what role is this judicial use of history performing?

The answer lies in the following paragraph of the judgment. Justice Cheung notes that his discussion of the 1970/71 reforms “leads to” his final point about the function of the Marriage Ordinance, “namely, restriction”.⁸ The effect of the court’s use of history suddenly becomes clear: in its discussion of the reforms, the court is in effect giving a historical narrative of how marriage became increasingly restricted in

⁶ For further discussions of the 1970–71 reform and of the history of marriage in Hong Kong, see Leonard Pegg, *Family Law in Hong Kong*, 3rd ed (Singapore: Butterworths Asia, 1994), pp 3–34 and Athena Liu, *Family Law for the Hong Kong Special Administrative Region* (Hong Kong: Hong Kong University Press, 1999), pp 3–55.

⁷ Para 112 (my italics).

⁸ Para 113.

Hong Kong, a story of how different forms of union were discarded so that only one dominant form – Christian marriage or its civil equivalent – remains. Within this narrative, to ‘regulate’ takes on the same meaning as to ‘restrict’. The function of the seemingly unrelated episode of standardizing marriage is therefore to set the stage for the court to say that the primary function of the ordinance is to restrict marriage to only one recognizable form, and that given the precedent of denying Chinese customary marriage, the law will not likely be in favour of any other dissident form of union, such as transsexual marriage. The court’s construction of the history of marriage here is a sleight of hand: by drawing on a completely unrelated episode from the past, it presents a narrative of history which seems to justify the view that the proper function of the Marriage Ordinance is, “namely, restriction” of unfamiliar forms of union.

Having set the stage for a restrictive view of the ordinance, the court then embarks on a discussion of the colonial origins of the current marriage laws in Hong Kong. Justice Cheung reminds us that the Marriage Ordinance was first enacted as Ordinance No.14 of 1875. The recourse to the genesis of the Marriage Ordinance forms the lynchpin of his argument that, on a proper interpretation of the words, a male-to-female transsexual does not come within the meaning of “woman” or “female” in the relevant legislation. His argument is as follows: given the historical context, the law of marriage in Hong Kong “was modeled essentially on the law of marriage in the United Kingdom, of which Hong Kong was a colony.”⁹ As a result, the ordinance must be interpreted in accordance with the doctrine of the Church of England. Citing *Halsbury’s Laws of England*, he notes that according to Church doctrine, “originally, marriage had a lot to do with procreation and the continuation of the family line. That is, or was, particularly true with a predominantly Chinese society in Hong Kong.”¹⁰ For Justice Cheung, procreation is an integral part of marriage in Hong Kong due to the historical genesis of the territory’s marriage laws. In his opinion, a male-to-female transsexual may look, act and sound like a woman, but the inability to procreate would mean automatic disqualification from consideration as a “woman” under the ordinance. He goes on to describe this view of the procreative aspect of marriage as “natural” and notes that the English case of *Corbett v Corbett* functions as authority for the Hong Kong courts to follow.¹¹ While Justice Cheung acknowledges that it may be possible to construe the

⁹ Para 115.

¹⁰ Para 206.

¹¹ Para 117.

ordinance as an “ongoing Act” in which the court gives a modern-day construction of the words of the ordinance in light of changing social and cultural circumstances, he opines that to do so in this instance would amount to unjustifiably altering or extending the meaning of the words.

There are a number of counter-arguments which can be advanced against the view that marriage is necessarily for procreation, one of which would be to question the court’s contentiously dismissive gesture of casting married couples who cannot have children as “exceptions” from the norm (this category presumably includes couples who are fertile but who do not want children).¹² From the perspective of a critique of the court’s use of history, the narrative of the history of marriage which Justice Cheung here posits, which insists that nineteenth-century Anglican Church doctrine is determinative of our understanding of marriage in twenty-first century Hong Kong, is problematic in several respects.

First of all, Justice Cheung’s recourse to an originalist construction of the ordinance masks the crucial fact that the view of the role of procreation in marriage within the Anglican community has changed over the years, so that it is now possible to argue that procreation is no longer a requirement of marriage even under Church doctrine. The changes in the view of Christian marriage within the Church of England can be traced by looking at the changes in the pronouncements on sex and marriage in the Lambeth Conferences. The Lambeth Conferences are global events convened once every ten years by the Archbishop of Canterbury, and represent occasions when bishops from all over the world gather for worship, study and conversation. The first Lambeth conference began in 1867, and they remain one of the most important gatherings within the Anglican community.

At the beginning of the twentieth century, the participants at the Lambeth conference regarded “with alarm the growing practice of the artificial restriction of the family”, and called upon all Christian people “to discountenance the use of all artificial means of restriction as demoralising to character and hostile to national welfare”.¹³ In other words, the Church regarded procreation as the centre piece of marriage, and any attempt at restricting it was deemed unacceptable. However, by 1930 there was already a shift in attitude: even though the bishops still agreed that “the primary purpose for which marriage exists is the procreation of children,” they agreed that in some situations there may be “a clearly felt moral obligation to limit or avoid parenthood”, in which

¹² Para 123.

¹³ Resolution 41 of the 1908 Lambeth Conference. Available at <http://www.lambethconference.org/resolutions/1908/1908-41.cfm> (visited 28 Jan 2011).

case the use of contraception between husband and wife was permitted.¹⁴ The 1930 conference signals an important change in the Church's attitude towards procreation in marriage, for it acknowledges that there are legitimate reasons and circumstances whereby a married couple would not have and may not even want children.

It is with Resolution 115 of the 1958 conference that we see the clearest move away from the presumption that marriage could not be dissociated from procreation:

The Conference believes that the responsibility for deciding upon the number and frequency of children has been laid by God upon the consciences of parents everywhere; that this planning, in such ways as are mutually acceptable to husband and wife in Christian conscience, is a right and important factor in Christian family life and should be the result of positive choice before God. Such responsible parenthood, built on obedience to all the duties of marriage, requires a wise stewardship of the resources and abilities of the family as well as a thoughtful consideration of the varying population needs and problems of society and the claims of future generations.¹⁵

The use of the expression "positive choice" in the context of procreation in marriage clearly shows that the decision whether to have children or not is to be made by the married couple in light of a complex interplay of factors, and that it can no longer be assumed that anyone who gets married would also want to procreate. In fact, the emphasis on "responsible parenthood", "wise stewardship of resources" and "thoughtful consideration" of societal and demographic needs hints at a reversal of attitude within the Church: instead of automatically assuming that someone who marries would also want children, these expressions suggest that the decision to have children is not to be taken lightly, and that if the balance of factors is not right, the Church would in fact encourage the couple to abstain from procreation. The decision not to have children, even from the outset of the marriage, can thus still be completely in line with Church doctrine.

In light of the changes in the Church of England's attitude towards the relationship between marriage and procreation, as reflected in the developments in the Lambeth conferences of the twentieth century, it is no longer possible to state, as Justice Cheung does, that "the central

¹⁴ Resolution 15 of the 1930 Lambeth Conference. Available at <http://www.lambethconference.org/resolutions/1930/1930-15.cfm> (visited 28 Jan 2011).

¹⁵ Resolution 115 of the 1958 Lambeth Conference. Available at <http://www.lambethconference.org/resolutions/1958/1958-115.cfm> (visited 28 Jan 2011).

theme of marriage, as is understood traditionally, is for the procreation of children".¹⁶ Justice Cheung's historical narrative presents the Church of England's attitude towards the centrality of procreation within marriage as a static one, when in reality this view has been rapidly evolving. It would therefore be unjust to deny a male-to-female the right to marry in the name of a Christian understanding of marriage carried over from the distant past.¹⁷

In addition to the need to interpret the Marriage Ordinance as an "ongoing Act" in order to bring it in line with developments in Church doctrine, there is a further reason for which the court's insistence on the link between marriage and procreation is problematic. The historical narrative which the court constructs here flies in the face of the nineteenth-century case of *Hyde v Hyde*, which it cites in support of its argument and whose definition of marriage is enshrined in s40(2) of the Marriage Ordinance.¹⁸ In *Hyde*, Lord Penzance opines that "marriage as understood in Christendom is the voluntary union for life of one man and one woman, to the exclusion of all others".¹⁹ Justice Cheung, when citing *Hyde*, claims that even though "this shorter definition does not [...] expressly refer to procreation, the traditional significance of procreation in Christian marriage, when viewed in the relevant religious and historical context, cannot be doubted".²⁰

One wonders which "relevant religious and historical context" he is referring to when he opines that "the traditional significance of procreation in Christian marriage" is everywhere evident in Lord Penzance's definition of marriage. When one returns to *Hyde* itself, it is possible to argue that the Lord Penzance's definition should be read literally: it does not include any reference to procreation, therefore procreation does not fall within the definition of marriage laid down in *Hyde* and enshrined in s 40(2) of Hong Kong's Marriage Ordinance. Support for a literal reading of the definition can be found within the language of *Hyde* itself. As he ponders over the meaning of marriage, Lord Penzance notes:

What, then, is the nature of this institution [of marriage] as understood in Christendom? Its incidents vary in different countries, but what are its

¹⁶ Para 123.

¹⁷ This section addresses the judgment on its own terms by assuming that the Church of England's view of marriage is indeed definitive in Hong Kong. One further issue that could potentially be raised is that after 1997, all ordinances should be interpreted in accordance with the Basic Law, and there is no special status granted to the Anglican Church in that document.

¹⁸ (1865–69) LR 1 P & D 130

¹⁹ *Ibid.*, 130.

²⁰ Para 116.

essential elements and invariable features? If it be of common acceptance and existence, it must needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.²¹

What Lord Penzance does in *Hyde* is to lay down the lowest common denominator for defining Christian marriage: the judge was determining the “essential elements and invariable features” without which a union cannot be said to fulfill the requirements of Christian marriage. In other words, the court in *Hyde* was concerned with determining all the attributes without which a union cannot be regarded as a Christian marriage. Significantly, procreation does not appear within this attempt to find the lowest common denominator; it is not part of marriage’s “pervading identity and universal basis”. The implication of *Hyde* is clear: Christian marriage, as defined here, does not require procreation. It is therefore problematic for the Hong Kong court to say that even though *Hyde* did not refer to procreation, “the traditional significance of Christian marriage” cannot be doubted. The opposite is true: *Hyde* did not refer to procreation because it did not conceive of procreation as a necessary part of Christian marriage. The lack of reference to procreation is carried over to s40(2) of the Marriage Ordinance: Christian marriage or the civil equivalent of a Christian marriage” as defined in that provision merely refers to a formal ceremony recognized by law whereby a man and a woman enter into a voluntary union to the exclusion of all others. To say that the importance of procreation “cannot be doubted” in the definition given in *Hyde* and enshrined in the ordinance is to impose onto it something that is simply not there.

To summarise this section of the argument, when we interrogate the court’s use of history in this case, whether by highlighting the irrelevance of certain historical episodes cited, by returning to the nineteenth-century case of *Hyde*, or by exposing the problems with the court’s recourse to the colonial origins of the Marriage Ordinance which supposedly justifies an originalist interpretation of the current laws, it becomes evident that the court’s view that a male-to-female transsexual does not have the right to marry because she cannot procreate is intensely problematic.

²¹ See n13 p 133.

The History of Marriage and the Constitutional Right to Marry

The court identifies Art 37 of the Basic Law and Art 19 of the Hong Kong Bill of Rights (which is based on Art 23 of the International Covenant on Civil and Political Rights) as the relevant constitutional law instruments under consideration. It rightly identifies the question of constitutionality as continuous with the question of interpretation discussed above: “the prior question is and remains: what is a “man” or a “woman” in the definition of “marriage” when referred to in the Basic Law (or in Art 19(2) of the Hong Kong Bill of Rights)?”²² Justice Cheung opines that the answer to this question rests on the need for “societal consensus” on the issue of transsexual marriage in Hong Kong: he notes since there is insufficient evidence to show that Hong Kong society as a whole accepts the idea of transsexual marriage, the court must refrain from tampering with the status quo, for doing so would be tantamount to giving the constitutional right to marry a meaning not originally within the scope of the Basic Law or the Hong Kong Bill of Rights.²³

Once again, the question of history is inextricably tied to the question of law in the judgment; the court constructs a narrative of history to justify its decision that there is a lack of the requisite societal consensus on transsexual marriage. Early on in the discussion, Justice Cheung notes: “Marriage as a social institution has existed for thousands of years. Whilst different marriage laws have come and gone, the institution, as evolved, remains”.²⁴ Even though he pays lip service to the idea that marriage as an institution does change by noting that it has “evolved”, the tenor of this brief historical narrative is clear: marriage as an institution has been relatively stable for “thousands of years” and should remain so. The court acknowledges that changes have occurred in the way people conceive of marriage in present-day Hong Kong, and realises that there is a trend moving away from the traditional model, yet it does not ultimately regard any of these changes as relevant. Overall, the historical narrative in the judgment presents marriage as a fixed, even monolithic entity that has resisted challenges. The court’s historical narrative therefore casts the current case of transsexual marriage as a challenge to millennia of conjugal orthodoxy, and which threatens to erode a largely fixed institution. In light of this view of the history of marriage, it is no surprise that the court believes that Hong Kong society

²² Para 183.

²³ Paras 219–223.

²⁴ Para 201.

has not reached a stage where transsexual marriage is no longer regarded as “repugnant”.²⁵

However, as historians of marriage have pointed out, it is erroneous to view marriage as an institution that has remained more or less stable throughout the centuries. In fact, the opposite is true: the institution of marriage has been continuously transforming, modifying and updating itself, so that it has never been a stranger to change. Its very nature and definition has been evolving for centuries.

Again, one needs to place the current case in historical perspective in order to think about whether transsexuals should have the right to marry. One major problem with Justice Cheung’s concept of “societal consensus” is that it is resolutely ahistoric: he notes that “one is concerned with what the current societal consensus is, rather than what it once was, or, what it might become in the future”.²⁶ While this focus on the present may be appropriate for some questions of constitutional right, given that marriage has a long and complex history in human society, one cannot mentally cut off this rich history when deciding on the question of the right to marry. Instead, one should understand the current case as one point in the evolution of the history of marriage, and reframe the question of the constitutional right to marry within the context of the ways in which marriage as an institution has developed over the years.

This section therefore suggests that, as an alternative to the court’s search for current “societal consensus”, one should place the question of whether ‘W’ has the right to marry within the context of the history of marriage. And within this context, it is amply clear that this right should not be denied.

This is because historically, the understanding of what a “woman” is or does within the context of marriage has evolved to promote greater equality.²⁷ The extent of this evolution can be seen when we contrast the legal position of women within the institution of marriage in the eighteenth century with their legal position in the twentieth-first century. In the eighteenth century, the notion of *coverture* dictated that a married woman had no separate legal existence from that of her husband. William Blackstone describes this doctrine as follows:

By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at

²⁵ Para 206.

²⁶ Para 191.

²⁷ On the specifically legal changes in marriage history, see chapters 3 and 4 in Sandra Feldman, *Women and the Law* (Oxford: Oxford University Press, 1998).

least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing.²⁸

Under this doctrine, a married woman's legal existence was subsumed under that of her husband. She could not own property in her own capacity, she was not allowed to live separately from her husband, she could not enter into contractual agreements on her own, she could not have a separate bank account, and legal custody of the children belonged to the father. As the popular saying went, "husband and wife are one person, and that person is the husband".²⁹

Throughout the second half of the nineteenth century and the entire duration of the twentieth century, there was a clear movement towards guaranteeing greater equality for women within marriage. The Matrimonial Causes Act, or the Divorce Act, of 1857, expanded the grounds of divorce available to a woman. It was still easier for a man to seek a divorce from this wife than the other way around, but a series of acts passed in 1878, 1886, and 1895 brought a wife's grounds for terminating a marriage increasingly close to those of her husband. The 1857 Act also gave married women greater control of their property. In 1870, the Married Women's Property Act was passed to increase the number of ways in which married women could retain their right to property, and in 1882 a further Act was passed which in effect gave a woman full ownership of any property which she owned at the time of marriage and which she acquired after marriage.³⁰ Moreover, in the late nineteenth and early twentieth century it was still widely believed that giving women the vote would lead to domestic discord, in so far as differences of political opinion may divide husband and wife. However, this belief did not prevent the enfranchisement of women in 1918. In the United States, a judgment handed down by the Supreme Court in 1873 initially denied married women the right to practice law, on the grounds that "the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband" and "the law of the Creator" dictates that the "paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother".³¹ However, the same Court granted the applicant a license to practise law in 1892, thus ensuring greater equality between husband and wife in the occupations

²⁸ William Blackstone, *Commentaries on the Laws of England*, Vol 1 (1765–1769), 3rd ed (Dublin: printed for John Exshaw, Henry Saunders, Boulter Grierson, and James Williams, 1769), p 442.

²⁹ Cited in Yalom (see n 2 above), p 185.

³⁰ See "Lee Holcombe, Victorian Wives and Property: Reform of the Married Women's Property Law, 1857–1882", in Vicinus (see n 2), pp 3–29.

³¹ *Bradwell v Illinois*, 83 US 130 (1872), p 142.

in which they can engage. Finally, on an international level, Art 16 of the Convention on the Elimination of All Forms of Discrimination Against Women clearly states that its signatory states are to take all appropriate measures to ensure equality within marriage, including giving the woman the same rights and responsibilities as her husband during and at the dissolution of a marriage.³²

The historical trajectory in Hong Kong has been complicated by its dual nature as a colonial society for much of its recent past, and also by its Chinese cultural context. One commentator has astutely pointed out that at times, Britain's desire to respect Chinese cultural traditions resulted in a fossilized understanding of Chinese culture that hindered the promotion of equality within marriage.³³ The trajectory has been convoluted and the struggle has been hard, but with hindsight it is possible to say that Hong Kong has largely, if somewhat belatedly, followed the trend towards equality in marriage. By Ordinance No.5 of 1858, a number of imperial enactments were given effect in Hong Kong, including provisions on divorce. The specific context of land inheritance in the New Territories complicated the question of married women's control of property, but after intense activism the indigenous women in the New Territories were finally granted the right to inherit land in 1994.³⁴ The watershed marriage law reform of 1970 abolished concubinage and extended women's right to inheritance and property ownership.

The changes in the history of marriage show us that, far from being an institution which has remained largely resistant to change over the years, marriage as an institution has been constantly modernising, revising and updating itself. Justice Cheung says that "Leaving aside those occasions when the law seeks to modify or change the social institution of marriage, the law's function is really to recognise, regulate and impose restrictions that represent generally recognised considerations of public interest on the institution of marriage as practised in society." However, one lesson that history teaches us is that it is precisely "those occasions

³² Available at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article16> (visited 22 March 2011).

³³ See Carol Jones, *Women and the Law in Colonial Hong Kong*, in Benjamin K.P. Leung and Teresa Y.C. Wong (eds), *25 Years of Social and Economic Development in Hong Kong* (Hong Kong: University of Hong Kong, 1994), pp 111–133.

³⁴ For a useful first-hand account of the women's rights movement in Hong Kong, with a discussion of the question of female inheritance of property in the New Territories, see Carole Petersen, "Equality as a Human Right: The Development of Anti-Discrimination Law in Hong Kong", (1996) 34 *Columbia Journal of Transnational Law* 335. For a discussion of a similar context with a more jurisprudential focus, see Harriet Samuels, "Women and the Law in Hong Kong: A Feminist Analysis", in Raymond Wacks (ed), *Hong Kong, China and 1997: Essays in Legal Theory* (Hong Kong: Hong Kong University Press, 1993), pp 61–87.

when the law seeks to modify or change the social institution of marriage” which are important, for upon those legal changes is the institution of marriage built. To leave them aside, as Justice Cheung believes we should do, would be nothing less than an act of willful blindness to how marriage has evolved.

In the nineteenth and twentieth centuries, the emphasis was on erasing the unjust distinctions between men and their wives, of making married women more equal to their spouses in terms of their rights and status, a move which would have been considered revolutionary at the time it was made. The current dilemma of whether we can make the seemingly revolutionary move of conceptualising a “woman” in marriage to include a male-to-female transsexual is a twenty-first century manifestation of the question of how far equality can be assured for the person occupying that position. In other words, the current issue of whether “woman” can mean a male-to-female transsexual in the context of marriage is a continuation of the question of how “woman” should be understood or conceptualized in marriage, and when the issue is placed in historical perspective, it becomes clear that a decision to allow W to marry would have been in line with the trend of promoting equality within the legal conception of a woman.

To include a male-to-female transsexual within the definition of “woman” in the relevant provisions of the Basic Law and the Hong Kong Bill of Rights would of course be a step towards consolidating the equal right to marry.³⁵ The legislature and the courts have shown admirable willingness to promote equality in their conception of a married woman throughout history, and the current case is simply another step in a long and continuing historical development. Giving a woman the right to own property like her husband, or giving a woman the right to open her own bank account, would have seemed as radical and inconceivable back then as giving a transsexual woman the right to marry perhaps does today. If the legislature or the courts of the past had deferred to “societal consensus”, those changes would never have occurred, and equality would have been denied to the women. However, those changes seem to us completely natural now. The point in recounting the historical development of marriage is not to argue that those developments occurred independently of societal consensus, but to point out that instead of deploying the ahistoric concept of societal consensus in the first place when determining whether W can marry, one could instead think historically and place the current case in the context of how

³⁵ For a further discussion of equality, see Kelley Loper’s article in this issue of HKLJ.

marriage has evolved. From this latter perspective, it is clear that the courts in Hong Kong should have the courage to continue this historical progress. Ensuring equality is emphatically a judicial issue and should not require societal consensus; placing the case in history shows that granting the right to marry to W would simply mean continuing the historical trajectory towards equality. The history of marriage continues to be written, and fifty years from now, a judicial decision allowing transsexuals to marry would seem as sensible as giving a married woman the right to open her own bank account or to practise law as a vocation.

Conclusion

Oscar Wilde once said that “the one duty we owe to history is to rewrite it”.³⁶ In the present context, this duty seems more important than ever; the Court of First Instance’s decision to deny “W” the right to marry is premised on a fundamentally flawed understanding of the history of marriage: it uses unrelated historical episodes to construct its historical narrative; it overlooks changes in the Church of England’s views of procreation through time; it misreads nineteenth-century case law; it is insufficiently attuned to the process of revision and updating in which the institution of marriage has been engaged over the years, and it fails to put the present case in the context of the institution’s historical development. How history is written has a profound impact on how we view the present. It is imperative for us, as lawyers and as jurists, to have a proper understanding of the history of marriage as the debate over “W” continues in Hong Kong.

³⁶ Oscar Wilde, “The Critic as Artist”, in *The Soul of Man Under Socialism and Selected Critical Prose*, ed Linda Dowling (London: Penguin, 2001), p 231.